IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1117 OF 2006

Prabhat Mahadav Naik
Presently confined to Kalyan
District Prison. ..Appellant.

V/s.

The State of Maharashtra ..Respondent.

WITH

CRIMINAL APPEAL NO.1196 OF 2006

Rajesh @ Dayanand Mahadev Patil
Presently in Kalyan
District Prison. ..Appellant.

V/s.

The State of Maharashtra ..Respondent.

Shri Arfan Sait for appellant in both the matters.

Mrs.S.S.Deshmukh, A.P.P. for respondent in both the matters.

CORAM : J.H.BHATIA, J.

DATED : 15TH MARCH, 2007.

ORAL JUDGMENT

These two appeals are preferred by original accused Nos.1 and 2 respectively challenging the order

of conviction for the offence punishable under section 328 & 379 of I.P.C. to undergo R.I. for four years and to pay fine of Rs.200/- on the first count and to undergo R.I. for one year and to pay a fine of Rs.100/- on the second count, passed by the Additional Sessions Judge, Sessions Court, Greater Bombay (Court No.35) in Sessions Case No.248/05.

2. In all six persons, including the present appellants, were put to trial for the offences punishable under section 328 and 379 r/w. 34 of I.P.C. Out of them, accused No.1 Prabhat, No.2 Rajesh and No.5 Anand were convicted and sentenced as above, while accused Nos.3, 4 & 6 were acquitted. Accused No.5 has not preferred any appeal, as per the information given by the office.

3. The prosecution case in brief is that P.W.1 Sandeep Dhananjay Awtade, a resident of Tasgaon, Dist. Sangli, used to come to Bombay for purchase of toner for the Xerox centre owned by his father. For the said purpose, he left Tasgaon on 30th November, 2001 by night train and reached Bombay on 1st December, 2001 at 6.00 a.m. On that day, he purchased the toner worth Rs.3,000/- from Patel Enterprises in Mody Street. After making the purchase, he wanted to go to Pune to

meet his cousin Anand Chandrakant Awtade. For this purpose, he boarded Hyderabad Express from Chhatrapati Shivaji Terminus, Mumbai. As it was a general compartment, he occupied the vacant space on the loft meant for keeping luggage of the passengers. The departure time of the train was 12.35 hours in the afternoon. Before the train left the station, two persons, who were later identified as accused Nos.1 & 5, also boarded the train and climbed the same loft and sat by the side of P.W.1 Sandeep. After the train left, one of them began chitchatting with P.W.1 Sandeep. The said person disclosed his identity as A.G.Anand and also that he was carrying business at Fashion Street, Mumbai. When the train stopped at Dadar station, he alighted and then came back with mango fruity boxes and offered one to P.W.1 Sandeep. P.W.1 Sandeep consumed the same. Another box of mango fruity was consumed by that person himself. As an effect of the said fruity, P.W.1 Sandeep fell asleep or lost his consciousness after the train left Kalyan. He regained consciousness at about 9.00 a.m. on the next day i.e. 2nd November, 2001 and found himself lying outside Pune Railway Station. He found that his bag containing clothes and the toner boxes, which he had purchased at Bombay and also his valet containing approximately Rs.450/- as well as gold bracelet,

weighing about 22 gms. were missing. He also lost his Ganesh pendent. Even though he had regained consciousness, he was not feeling well. He walked down to the house of his cousin Anand Awtade and reached there at about 1.00 p.m. As Anand was not at his house, Sandeep lied down outside the house. After some time, Anand Awtade came and took him inside the house. He again fell asleep. At about 8.30 p.m. he woke up and narrated the whole episode to Anand Awtade. Taking into consideration his physical condition, he was taken and admitted to Meera Nursing Home during that night. Next morning, police officer from Khadak police station came to Meera Nursing Home and recorded his statement which was treated as F.I.R. In that F.I.R., he gave description of the two persons, who were sitting by his side and he also described the articles which were allegedly stolen away by the culprits. On the basis of his report, crime No.226/01 came to be registered at Dadar Railway Police Station, where the crime was committed. For quite some time, there was no progress in the matter.

4. On 26/10/2004 information was received by P.S.I. Ramdas Jaywant Karpe (P.W.9) that a gang of persons, who used to give intoxicated drugs and after making the passengers unconscious used to commit

thefts, were expected to come to Grant Road, Pilla House, Bombay. After getting that information, P.S. Ramdas Karpe, who was then attached to Bandra Crime Branch, went to that area with six staff members and found accused No.1 Prabhat and No.2 Rajesh and No.3 Ashok in that house. They were arrested in this case. On the basis of information given by them their associate accused No.4 Rahul Dikshit also came to be arrested. Dikshit disclosed the name of accused No.5 Anand and accused No.6 Arun as members of the said gang and accordingly, they also came to be arrested. When they were in custody, on the basis of information given by accused No.2 Rajesh gold bracelet was recovered from P.W.4 Ramesh Jain, a Jeweller and it was revealed that accused No.2 had sold that bracelet to Ramesh Jain about three years before. During the investigation, all the six accused persons were put to test identification parade. P.W.1 Sandeep identified all of them. Accused Nos.1 and 5 were identified as the persons who were sitting on the loft while remaining accused were identified as the person who were sitting on the opposite loft in the same coach. After the investigation, charge-sheet was filed and case was registered as C.C.No.15/PW/2005 in the Court of Metropolitan Magistrate having jurisdiction of Dadar Railway police station. As the offence under section

328 of I.P.C. was triable by the Court of Sessions, the said case was committed to the Court of Sessions.

5. Charge was framed against all the six accused persons for the offences punishable under section 328 and 379 r/w. 34 of the I.P.C. They pleaded not guilty. On behalf of the prosecution, in all 9 witnesses were examined. Relying on the prosecution evidence, the learned trial Court convicted three of the accused, while acquitted the remaining three.

6. Heard Mr.Arfan Sait, advocate for appellants and Mrs.Deshmukh, A.P.P. Perused the record and proceedings of the trial Court.

7. P.W.1 Sandeep deposed in detail about his journey from Tasgaon to Mumbai and Pune and particularly from Mumbai to Pune. His evidence clearly shows that his father used to run Xerox Centre at Tasgaon. He used to come to Mumbai to purchase toner for the Xerox machine. For the said purpose, he came to Mumbai in the morning of 1st December, 2001. At about 9.30 a.m., he purchased toner worth Rs.3,000/- from one Patel Enterprises, situated at Modi Street. The property consists of 8 big and 4 small boxes. As

he wanted to meet his cousin Anand Chandrakant Awtade at Pune, he went to C.S.T. Mumbai at about 11.00 a.m. Hyderabad Express train was due to leave at 12.35 hours from C.S.T. As that train goes via Pune, he boarded the general compartment of the train. As the compartment was full, he occupied the vacant space on the loft meant for keeping luggage of the passengers. According to him, when he was sitting on the loft, two more persons, whom he identified lateron as accused No.1 Prabhat and accused No.5 Anand, also boarded the said loft and sat by his side. According to him, remaining four accused persons were sitting on the loft just in front of himself. As per his evidence, one of the two persons sitting by his side began to chit chat with him. He disclosed his identity as A.G. Anand and also that he was running a shop at Fashion Street, Mumbai. Due to this, conversation continued between the two. It may be noted that Sandeep identified that person as accused No.1 Prabhat. He deposed that when the train stopped at Dadar railway station, accused No.1 alighted from the train and came back along with five mango fruity boxes packed in plastic carry bag. Initially, accused No.1 offered water to P.W.1 Sandeep, but he refused. However, thereafter accused No.1 offered one mango fruity box which P.W.1 Sandeep accepted and drank. According to him, accused No.1

also drank from one of the box and one box was given to another person. According to him, he was conscious till the train reached Kalyan. Thereafter, he lost his consciousness. Next morning at about 9.00 a.m. he regained consciousness and found himself lying outside Pune railway station. According to him, he was not fully conscious and he slowly realised that his bag was missing. According to him, the bag contained his clothes and toner. His valet containing cash about Rs.450/- and gold bracelet and one Ganesh Pendent which was on his person, were also missing. Somehow, he walked down to the house of his cousin Anand Awtade. As said Awtade was not present at the house, Saneeep lied down on the heap of sand outside his house. After some time, Awtade came and took him inside the house. He was asleep till 8.00 p.m. As his condition was not satisfactory, his cousin took him and admitted to Meera Nursing Home in that night. Next morning, police came and recorded his statement which was treated as F.I.R. Exh.13 He described both the persons, who were sitting by his side on the loft and particularly the person, who was chit chatting and had offered him fruity. He identified accused No.1 Prabhat as the said person during his evidence before the Court and he also identified accused No.5 Anand as the second person who was sitting on the loft by his side. It is material to

note that he identified the other four accused persons, including accused No.2 Rajesh as the persons who were sitting on the loft in front of himself.

8. Admittedly, the culprits could not be found for a period of about three years and as per the evidence of P.W.9 P.S.I. Ramdas Karpe, the accused persons were arrested in the last week of October, 2004. The evidence of P.W.5 Bagaram Chaudhari shows that he used to work at Society Medical Stores, Dadar. According to him, one Dilip Shah was owner of the shop and he himself and other persons were working in the shop. He used to given medicines to the customers as per prescriptions. On 6/11/2004 when he was on duty at the Society Medical Stores, police brought three accused persons whose faces were covered. When they were shown to him, he identified accused No.1 as the person, who used to purchase the medicine known as Larcose (2mg) frequently. According to him on two or three occasions, he had purchased the said medicine. He also deposed that after taking this medicine, one may fall asleep for 2/3 hours. His evidence does not specifically point out on what date or during which period the said medicine was purchased by the appellant / accused No.1.

9. Even though evidence of P.W.5 Bagaram does not give an idea when accused No.1 might have purchased the said medicine from P.W.5 Bagaram, atleast his evidence shows that accused No.1 used to purchase such medicine which was likely to intoxicate and cause drowsiness. The evidence of P.W.1 Sandeep shows that accused No.1 had served a mango fruity box to him at Dadar and as a result of this, after crossing Kalyan, he became unconscious and remained in that condition till next day morning. There is no reason to disbelieve his evidence. It is material to note that the identification parade was held within few days after the arrest of the accused persons and accused No.1 was identified by P.W.1 Sandeep during the test identification parade, as proved by P.W.1 Sandeep and P.W.2 Apubhai Makwana, Executive Magistrate. The learned trial Court has minutely noticed the evidence pertaining to the identification and rejected identification of accused Nos.2, 3, 4 & 6 particularly because no role was attributed to them in the F.I.R. I find no reason to disagree with the trial Court in respect of the identification of accused persons. In my opinion, taking into consideration the evidence in its totality, the identification of the accused No.1 cannot be disbelieved. The learned trial Court noted that this accused was sitting and was chit chatting

with P.W. 1 Sandeep for a period of about two hours or so, and therefore, there was sufficient time for watching him and as he fell unconscious after that incident, it was impossible for him to forget the said person. I fully agree with this observations. Therefore, in my opinion as far as accused No.1 Prabhat is concerned, there is no doubt about his involvement in the commission of this crime.

10. As far as the accused No.2 is concerned, he was one of the persons sitting on the opposite loft. As identification parade of the four of the accused persons including accused No.2 is not believed by the Trial Court, much reliance cannot be placed on the testimony of P.W.1 Sandeep as far as the accused No.2 Rajesh is concerned. However, the evidence of P.W.9 P.S.I. Ramdas Karpe reveals that after the arrest, on 3rd November, 2004 the accused No.2 Rajesh made a confessional statement wherein he informed that he had sold the gold bracelet, which was received by him in the theft committed in the Hyderabad Express train in December, 2001, to P.W.4 Ramesh Mithalal Jain, a Jeweller at Kurla. He agreed to show the same. His statement was recorded as memorandum Exh.28 in the presence of two panch witnesses as per the evidence of P.W.9 Ramdas Karpe. Thereafter, accused No.2 Rajesh

took the police party and the panch witnesses to Marudhar Jewellers, Kurla (W). When they went to the shop, P.W. 4 Ramesh Jain was present. Accused No.2 Rajesh pointed out the said Ramesh Mithalal Jain and told that he had sold the bracelet to said Ramesh. Thereafter, P.W.4 Ramesh Jain produced one gold bracelet weighing 22 gms. That bracelet was seized under panchanama Exh.28/1. P.W.4 Ramesh Jain supported the prosecution. According to his evidence, his shop is situated in Shop No.4, Sunderbaug, Indiranagar, Kamani, Kurla. He was acquainted with the accused No.2 Rajesh Patil, as he also used to reside in Sunderbaug area. According to him, accused No.2 Rajesh had some transactions at his shop on some occasions. He had purchased some articles and on some occasion he had pledged certain articles. P.W.4 Ramesh deposed that in November, 2004 Rajesh was brought to his shop by the police and at that time, he himself produced the said bracelet before the police and the same was seized under panchanama. According to him, this bracelet was pledged with him for an amount of Rs.6,000/- by accused No.2 Rajesh Patil. The description of the bracelet seized from Ramesh Jain in panchanama Exh.28/1 fully tallies with the description given in the F.I.R. by P.W.1 Sandeep. In the F.I.R. it is clearly mentioned that the bracelet had design of belt of wrist watch.

P.W.1 Sandeep identified the said bracelet, article No.1 as is missing bracelet. In view of this, it is clear that gold bracelet of Sandeep which was stolen away from his person after he had become unconscious in the train, was sold or pledged by accused No.2 Rajesh at the shop of P.W.4 Ramesh, within a short time after that incident. In view of the provisions of section 114 of the Evidence Act, it can be presumed that the accused No.2 himself had committed the offence or he was one of the persons who had committed the offence and that is how he had come in possession of the said bracelet and within a short period thereafter, he had disposed it off. Learned counsel for the accused / appellant contended that the panch witnesses had not supported the prosecution case against accused No.2 and, therefore, evidence of P.W.4 Ramesh and P.W.9 P.S.I. Karpe cannot be believed. I am unable to accept this contention. There was no reason for these two witnesses to falsely implicate accused No.2 Rajesh. Their evidence is corroborated by discovery of bracelet of P.W.1 Sandeep from the shop of P.W.4 Ramesh.

11. In view of the evidence on record, there is reason to believe that some intoxicant or stupyfing drug was served and administered to P.W.1 Sandeep in mango fruity by accused No.1 at Dadar railway station.

After drinking that mango fruity, he became unconscious by the time, the train crossed Kalyan railway station. Such offences are not committed by a single person. Generally a gang of persons operate in committing such offence. While there is direct evidence that accused No.1 had served the mango fruity drink and thus administered some stupefying drugs causing unconsciousness of P.W.1 Sandeep, there is reason to believe that the accused No.2 Rajesh must have been his companion in commission of the crime and he got the bracelet from the stolen property. He disposed of that bracelet by selling or pledging at the shop of P.W. 4 Ramesh Jain. May be he did it for himself or may be he had to share the price with his other companions. In either case, he will also have to be held guilty equally with accused No.1. In view of this, in my opinion the offence under section 328 and 379 r/w. section 34 of I.P.C. has been established against accused Nos.1 & 2 and the learned trial Court has rightly convicted both of them for the offences punishable under section 328 and 379 r/w. 34 of I.P.C.

12. Mr.Arfan Sait, learned counsel for the appellant pleaded for leniency on behalf of the appellants. He contended that they are in custody for last about two and half years and thus they have

undergone more than fifty percent of the sentence awarded by the trial Court. According him, the sentence which they have undergone is sufficient and they should be released. However, this prayer is strongly opposed on behalf of the prosecution taking into consideration the nature of the offence. Offence under section 379 of I.P.C. is punishable with an imprisonment, which may extent to 3 years or with fine or with both. The offence under section 328 of I.P.C. is punishable with imprisonment, which may extend to 10 years with fine. The offence of administering stupefying or intoxicating drug to passengers in train and then committing offence of theft is a serious offence and such criminals do not deserve any leniency. The learned trial Court awarded imprisonment for 4 years for the offence under section 328 of I.P.C. In my opinion, the sentence is just and reasonable and needs no interference.

13. For the reasons stated above, I find no merit in the appeals and the same are liable to be dismissed.

14. Both the appeals stand dismissed.

(J..H.BHATIA, J.)